

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 112870/2006

STEPHENSON, DEVONE

VS.

FOOD BANK FOR NYC

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. 112870/2006

MOTION DATE 10/14/08

MOTION SEQ. NO. 002

MOTION CAL. NO. 11

This motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

12

3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED

OCT 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 16, 2008



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
DEVONE STEPHENSON,

Plaintiff,

-against-

FOOD BANK FOR NEW YORK CITY, FOOD FOR
SURVIVAL and LAWYERS ATHLETIC LEAGUE,
INC.,

Defendants.
-----X

Index No. 112870/2006
Mot. Seq. No. 002
Cal. No. 11
Submission Date 10-14-2008

**APPEARANCES
ON THE MOTION:**

For Plaintiff:
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For Defendant Lawyers Athletic League:
Wade Clark Mulcahy
By: Lora H. Gleicher, Esq.
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(212) 267-1900

For Defendants Food Bank for New York City and Food for Survival:
Did not appear on the motion.

Papers considered on this motion:

Notice of Motion–Affidavits–Exhibits–Memo of Decision
Affirmation in Opposition–Exhibits
Reply Affirmation

FILED
OCT 21 2008
1, 2
COUNTY CLERK'S OFFICE
NEW YORK

PAUL G. FEINMAN, J.:

Defendant Lawyers Athletic League, Inc. (the League), moves pursuant to CPLR 3212 for summary judgment in its favor. For the reasons which follow, the motion is granted and the complaint is dismissed as are any cross claims asserted against it.

Factual and Procedural Background

The League organizes and schedules basketball games for its member teams. One such team is organized by the law firm of Milberg Weiss Bershad Specthrie & Lerach¹ (the Milberg

¹ The law firm is now known as Milberg LLP.

Weiss team).

Plaintiff Devone Stephenson alleges that on March 1, 2006 there was a basketball game between the Milberg Weiss team, of which he was a member, and a team organized by the Food Bank For New York City (the Food Bank team), that is part of the New York Corporate Athletic League (Corporate League). Stephenson had previously played Division I basketball on full scholarship in college, was 6'8" tall and weighed 215 pounds. At Stephenson's deposition he described the events that led up to the incident that resulted in this lawsuit as follows:

Really this whole [Food Bank] team was talking trash, and most of it was directed toward[] me because, one, I was the biggest guy on my team and, two, I was the best player, basically, on the court. But[,] I was trash-talking a little bit back and forth to, you know, some of the guys, maybe the guy the guy [who] was guarding me.

(Not. of Mot. Ex I, Stephenson EBT at p. 18, ll. 19 - 25). Stephenson contends that during the first half of the game, both he and his team captain, David Cohen, asked the referees to stop the other team from trash-talking and to "clean up the game," however, the referees failed to do so. The second half of the game, according to Stephenson, "was more [of] the same, a lot of trash-talk, a lot of taunting." (Id. at p. 25, ll. 22 -24.) Stephenson explained,

The play was still very physical, but in the second half I remember, you know, I made a conscious effort to say to myself, "Listen, D, you are a much better play than these guys." I am going to let my game do the talking. I said that to myself. I wasn't going to engage in any more verbal communication with these guys, I said. Boom, I got the ball, drove to the basket, I got fouled, and I made my mind up I was going to the basket every time, get fouled and get these guys in foul trouble, and foul them up. It was working. I got fouled, I believe, four times consecutively. And in basketball, you know, they won't allow you to shoot free-throws until you have been - you are over a certain foul, almost.

They reached the last foul on the fourth foul, I believe, and

so I went to the line – actually, I walked to – it’s called the top of the key. You gather yourself after you foul, then you take your time and walk.

So, as I’m walking to the foul line, I hear, “Yo, big man. Yo, big man.” I ignored for the first couple of times, but I heard it – like he kept saying it, “Yo, big man. Yo, big man,” like at least seven times. So finally, I turn around, and I see one of the Food Bank players, one of the guys that was playing in the game, I don’t know his name, and I turned around and he said, “You better watch those elbows,” and I just dismissed it, turned to talk away. Next thing I knew, I was getting up from the floor.

(Id. at p. 25, l. 24 - p. 27, l. 9). A player for the Food Bank team who had signed in as “T” had punched Stephenson in the face, fracturing his jaw. Plaintiff’s injuries required treatment by oral surgeons and the wiring of his jaw. Apparently “T” was not an authorized player as he was not a Corporate League member. As a result of this incident, Steve Frenchman, the Commissioner of both leagues at issue, permanently suspended the Food Bank team and its captain Chris Dawson. (Not. of Mot., Ex. H, Frenchman EBT, p. 52).

Stephenson alleges that the League was negligent in its supervision, operation and control of the basketball game, its league, the referees, and the Food Bank team, and in failing to have a representative at the game to properly monitor the actions of the players.

According to the League, it merely arranges and schedules the basketball games between member teams and provides two referees who are certified by the International Association of Basketball Board of Officials (IABB).

The League asserts that in order to play on a team the team member must fill out a form online, including a waiver provision, which states that the undersigned:

1. Acknowledge and duly understand that each participant will be engaging in activities that involve risk of serious injury, including

permanent disability and death, and severe social and economic losses which might result not only from their own action, inactions or negligence but the actions, inactions or negligence of others, the rules of play, or the condition of the premises or of any equipment used. Further, that there may be other risks not known to us or not reasonably foreseeable at this time.

3. Assume all the foregoing risks and accept personal responsibility for the damages following such injury, permanent disability or death.

4. Release, waive, discharge and covenant not to sue the Lawyers Athletic League, Inc., Lawyers Athletic Association, Inc., the Lawyers Basketball League, the New York City Corporate Basketball League, Lawyer Volleyball League and its related Leagues and affiliated organizations, their directors, commissioners, referees, employees, agents, facilities and sponsors from any and all liability to the undersigned, his or her heirs and next of kin for any and all claims, demands, losses or damages on account of injury, including death or damage to property, caused or alleged to be caused in whole or in part by the negligence of Lawyers Athletic League, Inc. or its related "releasees" enumerated above.

By checking this box the participants have read the above waiver & release, understand that they are giving up substantial rights by checking it and check it voluntarily.

(Lawyers Basketball League - Waiver Form, Affirmation in Support of Lora H. Gleicher, Exhibit H).

In addition, according to the League, in order to play, players must sign a roster before the game begins which states, in pertinent part:

The undersigned understands the risks inherent in playing Basketball and Volleyball and hereby assumes all risks incident to such activities and agrees to indemnify and save harmless The Lawyers Basketball and Volleyball Leagues, The New York Corporate Basketball League, The Lawyers Athletic League, The

Lawyers Athletic Association, Inc. and affiliated organizations, their directors, commissioners, agents and facilities against all losses, claims actions, suits, expenses, liabilities, damages or legal fees on account of any loss or injury to persons or property incurred or caused by the acts of the undersigned.

(Roster, Gleicher Affirmation, Exh. K).

Although Stephenson states that he does not remember submitting the online form, he does not deny having submitted it, and the League submits copies of both the online waiver and the game roster signed by Stephenson. According to the League, Stephenson thereby waived any claim against the League for his injury.

Discussion

Waivers, such as that submitted to the League by Stephenson, have been found to be valid by the courts. In *Bufano v National Inline Roller Hockey Assn.* (272 AD2d 359, 359-360 [2d Dept 2000]) where the plaintiff was injured in a fight with another player during a game, the release signed by the player was upheld as enforceable because it “expressed in clear and unequivocal language the intent to relieve the defendants of all liability for personal injuries ... caused by the defendants’ negligence.” The Court also noted that by voluntarily participating in the game, the plaintiff assumed the risk of the injuries that he sustained. *See also Castellanos v Nassau/Suffolk Dek Hockey, Inc.*, 232 AD2d 354 (2d Dept 1996) (by voluntarily participating in a game, an experienced player who signed a waiver form, assumed the risk of the injury that he sustained). Here too, the online release submitted by Stephenson expressly releases the League from injury caused by any negligence by the League and also indicates that the signer assumes the risk and accepts personal responsibility for not only his own “action, inactions or negligence but the actions, inactions or negligence of others” (Affirmation in Support of Lora H. Gleicher,

Exhibit H). Moreover, electronic signatures are valid under New York law (State Technology Law § 304 [2]).

Citing *Long v State of New York* (158 AD2d 778 [3d Dept 1990]), Stephenson argues that releases for negligence will be closely scrutinized and will not be interpreted to bar claims outside the contemplation of the parties. Stephenson further contends that being hit by another player could not have been contemplated as a risk of the game. In *Long*, however, the defendant State of New York was not named in the Waiver and Release form. Furthermore, while the document in question stated generally that the plaintiff understood “that there may be risks of injury in connection with the event” and acknowledged that “I am voluntarily assuming any and all risk” (*id.* at 779), it did not expressly release from negligence even the entity that was named in the release, the Albany Medical Center. Here, in contrast, the release expressly releases and covenants not to sue the League for its negligence, and the signer also expressly assumes the risk not only of his own actions, but the actions, inactions or negligence of others. The fact that the waiver and release does not expressly mention the possibility of injury resulting from an assault by another player, even a player not properly admitted, does not render it invalid.

Citing *Barnum v Millbrook Care Ltd. Partnership* (850 F Supp 1227 [SD NY 1994], *affd* 43 F3d 1458 [2d Cir 1994]) and *Jacob Gold Realty Inc. v Sckoczylas* (186 Misc 2d 612 [App Term, 2d Dept 2000]), Stephenson further argues that, in any case, the roster signed by plaintiff at the time of the game, containing the assumption of risk paragraph, does not create an express assumption of risk covering the assault, but rather limits the assumption of risk to those risks that are known and apparent to the player. Plaintiff contends that because the roster was signed after the online waiver form, it supercedes the waiver form. Although it is true that where there is a

conflict between the new and old terms, the new language will control (*see Jacob Gold Realty Inc. v Skoczylas, supra*), here, there is no conflict between the on-line waiver and the assumption of risk and indemnification provision contained in the roster document signed by Stephenson at the time of the game. Thus, the original waiver is not superceded.

Stephenson argues that the League was negligent in its supervision of the referees, who failed to prevent the assault by the Food Bank player. Because the court finds the waiver and release to be valid, it is not necessary to reach the League's argument that the referees were independent contractors and thus the League was not responsible for the manner in which they refereed the game.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendant Lawyers Athletic League, Inc. is granted and the complaint and any and all cross claims are dismissed as to it with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action is severed shall continue under this index number.

Dated: October 16, 2008
New York, New York


J.S.C.

